

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

HECTOR MATOS, JR.,

Plaintiff,

v.

No. 05-CV-1273
(DNH/DRH)

JOHN BURGE, Superintendent; MARK BRADT, Deputy Superintendent; WILLIAM J. MARTENS, Sgt.; E. RIZZO, Correctional Officer; PORTEN, Correctional Officer; JOHN DOE 1, Correctional Officer; T. CHRISTOPHER, Sgt.; SHARPLES, Nurse; STATON, Correctional Officer; JOHN DOE 2, Correctional Officer; JOHN DOE 3, Correctional Officer; JANE DOE, X-ray Technician; AHSAN SAMINA, Doctor; JOHN DOE #4, Nurse; #5 JOHN DOE, Sgt.; #6 JOHN DOE, Correctional Officer; #7 JOHN DOE, Correctional Officer; DOCTOR KOOL; and McKEEN, Correctional Officer,

Defendants.

APPEARANCES:

OF COUNSEL:

HECTOR MATOS, JR.
Plaintiff Pro Se
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Bronx, New York 10463

HON. ANDREW M. CUOMO
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of New York
Attorney for Defendants
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DAVID L. COCHRAN, ESQ.
Assistant Attorney General

**DAVID R. HOMER
U.S. MAGISTRATE JUDGE**

REPORT-RECOMMENDATION AND ORDER

Plaintiff pro se Hector Matos, Jr. ("Matos") commenced this action while incarcerated in the New York State Department of Correctional Services (DOCS) against

numerous DOCS employees alleging violations of his civil rights. Docket No. 1. Defendants filed an answer. Docket No. 48. While the case has remained pending, Matos was released from DOCS custody. Docket No. 79. Defendants then noticed Matos for an oral deposition scheduled for October 19, 2007. However, Matos failed to appear for the deposition. Docket No. 82. A telephone conference was then scheduled with defendants' counsel and Matos by the undersigned for November 15, 2007 and Matos was sent written notice of the conference. Text Notice dated 10/31/2007. The notice required Matos to contact the Court with a telephone number where he can be reached, but Matos never did so. The conference was held as scheduled on November 15, 2007. Defendants' counsel appeared, but Matos never appeared nor contacted the Court. By his failure to appear for deposition and for the court conference, it appears that Matos has abandoned prosecution of this action.

Under Fed. R. Civ. P. 41(b), a court may dismiss an action for a plaintiff's sustained failure to prosecute the action. See West v. City of New York, 130 F.R.D. 522, 524 (S.D.N.Y. 1990); see also N.D.N.Y.L.R. 41.2(a) ("Whenever it appears that the plaintiff has failed to prosecute an action or proceeding diligently, the assigned judge shall order it dismissed. . . ."). In determining whether to dismiss an action on this ground, a court should consider the duration of a plaintiff's failures, whether the plaintiff has received notice that further delays would result in dismissal, whether the defendant was likely to be prejudiced by further delay, a balancing of the court's need to alleviate calendar congestion with a party's right to due process, and the efficacy of lesser sanctions. See Patterson v. Newspaper & Mail Deliverers' Union of N.Y. & Vicinity, 884 F. Supp. 869, 872 (S.D.N.Y. 1995); Stoenescu v. Jablonski, 162 F.R.D. 268, 270 (S.D.N.Y. 1995).

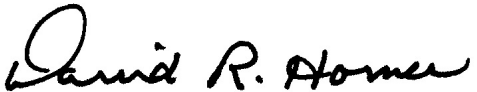
WHEREFORE, it is hereby

RECOMMENDED that this action be **DISMISSED** as to all claims and all defendants.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Small v. Sec'y of HHS, 892 F.2d 15 (2d Cir. 1989); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

IT IS SO ORDERED.

Dated: November 16, 2007
Albany, New York


United States Magistrate Judge